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Danish Supreme Court decision on preemptory invalidity in relation to a patent application (Dupont/Danisco v. Novozymes)

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We have previously reported (post 28 August 2012) on ongoing litigation in Denmark between DuPont/Danisco and Novozymes resulting at the time in the grant of an interlocutory injunction being firstly granted and then revoked as the patent-in-suit was subsequently invalidated.

In a more recent development, DuPont/Danisco filed suit at the Maritime & Commercial Court (MCC) claiming that Novozymes be ordered to acknowledge that a patent application, when and if ultimately granted, should be held invalid in Denmark.

Novozymes argued, principally, that the action be dismissed and in the alternative that Novozymes be acquitted. The principal plea for dismissal was then made the subject of separate proceedings.

The facts of the case pertaining to the separate proceedings were that the application-in-suit had yet to be formally granted, but EPO's intention to grant had already been communicated to Novozymes and the separate question to be heard by the MCC was therefore whether or not the dispute brought before the MCC was actually admissible for adjudication at a time when a patent had not (yet) been formally granted.

Novozymes, inter alia, argued that in essence what DuPont/Danisco wanted the MCC to consider was whether or not an inter partes invalidity suit would be admissible even before a patent had been formally granted, whereas DuPont/Danisco, inter alia, argued that the application was for all intents and purposes to be considered as granted and that consequently there were sufficient grounds to have an invalidity action admitted and adjudicated in substance.

The MCC held to dismiss the claim on the grounds that DuPont/Danisco had brought the action in order to bring clarification as to a legal uncertainty that would only arise once a patent were formally granted and as long as no patent had been granted, DuPont/Danisco could not be deemed as having sufficient legal interest in having the dispute adjudicated. The MCC also noted that as long as a pending patent application has not resulted in the grant of a patent, third party invalidity actions are limited to filing observations without being able to obtain the legal status of being a formal party to invalidity proceedings.

On appeal, the Supreme Court upheld the MCC's decision to dismiss the action.

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